

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2100

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
GUSTAVE ZURAK, WILLIAM MC AULIFFE,
SALVATORE ZAMBUTO, WILLIE MACK,
BENJAMIN SANTIAGO, MARTIN HALPERN,
on behalf of themselves and all others
similarly situated,

Plaintiffs-Appellees,

-against-

PAUL J. REGAN, BENJAMIN WARD, RAYMOND
DORSEY, WILLIAM BARNWELL, FRANK CALDWELL,
MAURICE DEAN, MARTIN GILBRIDGE, FRANK
GROSS, ADA JONES, MILTON LEWIS, JOHN
MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and
ANGEL LUIS RIVERA, Commissioner of New York
State Board of Parole, individually and in
their official capacities,

Defendants-Appellants.
-----X

Index No. 76-2100

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pls

BRIEF FOR APPELLEES

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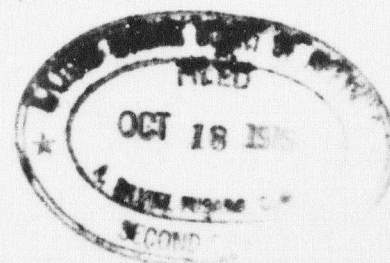


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	ii
STATEMENT OF FACTS.....	1
ARGUMENT.....	15
POINT I - DUE PROCESS ATTACHES TO THE CONDITIONAL RELEASE DECISION-MAKING PROCESS.....	15
POINT II - THE MINIMAL DUE PROCESS SAFEGUARDS IMPOSED UPON APPELLANTS WERE PROPER.....	24
A. The District Court Properly Imposed Upon Appellants The Requirement Of A Personal Hearing.....	31
B. The District Court Properly Ordered Appellants To Provide Appellees With A Statement Of Reasons And Evidence Relied On If The Conditional Release Is Denied Or Deferred.....	39
C. The District Court Properly Ordered That Conditional Release Applications Be Considered In A Timely And Orderly Manner.....	42
POINT III - THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT MANDATES A PERSONAL APPEARANCE BEFORE THE PAROLE BOARD FOR CONDITIONAL RELEASE APPLICANTS AT RIKERS ISLAND AND AN ADEQUATE WRITTEN STATEMENT OF REASONS IF RELEASE IS DENIED.....	45
CONCLUSION.....	50

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Allee v. Medrano</u> , 416 U.S. 802 (1974)	40
<u>Andujar v. Weinberger</u> , 69 F.R.D. 690 (S.D.N.Y. 1976)	42
<u>Armstrong v. Manzo</u> , 388 U.S. 545 (1965)	24
<u>Argersinger v. Hamlin</u> , 407 U.S. 25 (1972)	48
<u>Baldwin v. New York</u> , 399 U.S. 66 (1970)	48
<u>Bell v. Burson</u> , 402 U.S. 535 (1971)	34
<u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972)	20
<u>Boddie v. Connecticut</u> , 401 U.S. 371 (1971)	24
<u>Boyd v. Adams</u> , 513 F.2d 83 (7th Cir. 1975)	40,41
<u>Bradford v. Weinstein</u> , 519 F.2d 728 (4th Cir. 1974), <u>vacated as moot</u> , _____ U.S. _____, 96 S. Ct. 347 (1975)	16,17,21,32
<u>Breed v. Jones</u> , 421 U.S. 519 (1975)	28-29
<u>Cafeteria & Restaurant Workers Union v. McElroy</u> , 367 U.S. 886 (1971)	24
<u>Cardaropoli v. Norton</u> , 523 F.2d 990 (2d Cir. 1975)	34

CASESPAGE

<u>Carey v. White,</u> 375 F. Supp. 1327 (D. Del. 1974)	40
<u>Childs v. United States Board of Parole,</u> 511 F.2d 1270 (D.C. Cir. 1974)	16
<u>Cruz v. Beto,</u> 405 U.S. 319 (1971)	44
<u>Cypress v. Newport News General and Non- sectarian Hospital Assn.,</u> 375 F.2d 648 (4th Cir. 1967)	41
<u>Detainees of Brooklyn House of Detention for Men v. Malcolm,</u> 520 F.2d 392 (2d Cir. 1975)...	29
<u>Franklin v. Shields,</u> 399 F.Supp. 309 (W.D. Va. 1975)	26,34,37
<u>Fuentes v. Shevin,</u> 407 U.S. 67 (1972)	24,34
<u>Gagnon v. Scarpelli,</u> 411 U.S. 778 (1973)	28,29,32
<u>In re Gault,</u> 387 U.S. 1 (1967)	27
<u>Goldberg v. Kelly,</u> 397 U.S. 254 (1970)	24,32,34,35
<u>Goldsmith v. Board of Tax Appeals,</u> 270 U.S. 117 (1926)	17
<u>Goss v. Lopez,</u> 419 U.S. 565 (1975)	33
<u>Gray v. Sanders,</u> 372 U.S. 368 (1963)	41
<u>Groppi v. Wisconsin,</u> 400 U.S. 505 (1971)	48
<u>Hagans v. Lavine,</u> 415 U.S. 528 (1974)	43-44

CASESPAGE

<u>Hampton v. Mow Sun Wong,</u> ____ U.S. _____, 44 USLW 4737 (June 1, 1976)	17
<u>Haymes v. Regan,</u> 525 F.2d 540 (2d Cir. 1975)	16,39
<u>Hornsby v. Allen,</u> 326 F.2d 605 (5th Cir. 1964)	17
<u>Johnson v. Avery,</u> 393 U.S. 483 (1969)	32
<u>Joint Anti-Fascist Committee v. McGrath,</u> 341 U.S. 123 (1951)	24
<u>Kohlman v. Norton,</u> 380 F.Supp. 1073 (D. Conn. 1974)	26
<u>Konigsberg v. State Bar,</u> 353 U.S. 252 (1957)	17
<u>Lankford v. Gelston,</u> 364 F.2d 197 (4th Cir. 1966)	41
<u>Masiello v. Norton,</u> 364 F.Supp. 1133 (D. Conn. 1973)	26
<u>Matthews v. Eldridge,</u> ____ U.S. _____, 47 L.Ed.2d 18 (1976)	24,25,34,35, 36,37
<u>Malinski v. New York,</u> 324 U.S. 401 (1945)	28
<u>Mayer v. City of Chicago,</u> 404 U.S. 189 (1971)	48
<u>Meachum v. Fano,</u> ____ U.S. _____, 49 L.Ed.2d 451 (June 25, 1976)	21,22
<u>Montagne v. Haymes,</u> ____ U.S. _____, 49 L.Ed.2d 466 (June 25, 1976)	21,22

CASESPAGE

<u>Morrissey v. Brewer,</u> 408 U.S. 471 (1971)	21, 22, 24, 25, 28, 34, 35, 47
<u>Mower v. Britton,</u> 504 F.2d 396 (10th Cir. 1975)	16
<u>Mullane v. Central Hanover Tr. Co.,</u> 339 U.S. 306 (1950)	24
<u>Nelson v. Sugarman,</u> 361 F.Supp. 1132 (S.D.N.Y. 1972)	42
<u>N.L.R.B. v. Rayther,</u> 398 U.S. 25 (1970)	41
<u>Oregon v. Mitchell,</u> 400 U.S. 112 (1970)	46
<u>Perez v. Lavine,</u> 378 F.Supp. 1390 (S.D.N.Y. 1974)	42
<u>Perry v. Sinderman,</u> 408 U.S. 593 (1972)	22-23
<u>Reed v. Reed,</u> 404 U.S. 71 (1971)	48
<u>Rinaldi v. Yeager,</u> 384 U.S. 305 (1966)	47
<u>Rizzo v. Goode,</u> ___ U.S. ___, 44 U.S.L.W.4095 (Jan. 21, 1976)	44
<u>In re Rodriguez,</u> 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Repr. 552 (1975)	27
<u>Schwartz v. Board of Bar Examiners,</u> 353 U.S. 232 (1957)	17
<u>Scott v. Kentucky Board of Parole,</u> ___ U.S. ___, 44 U.S.L.W. 3358 (1975)	16
<u>Shapiro v. Thompson,</u> 394 U.S. 618 (1969)	29, 46

CASESPAGE

<u>Shepard v. United States Board of Parole,</u> <u> F.2d (2d Cir., slip. op. at 5413,</u> <u>September 7, 1976)</u>	36,43
<u>Simmons v. United States,</u> 348 U.S. 397 (1955)	17
<u>Smith v. Illinois Bell Telephone Co.,</u> 270 U.S. 587 (1926)	42
<u>Speiser v. Randall,</u> 357 U.S. 513 (1958)	17
<u>State v. Pohlabel,</u> 61 N.J. Super. 242, 160 A.2d 647 (1960)	27
<u>Taylor v. Hayes,</u> 418 U.S. 488 (1974)	33
<u>United Mine Workers v. Gibbs,</u> 383 U.S. 715 (1966)	44
<u>United States v. Concentrated Phosphate</u> <u>Export Assn.,</u> 393 U.S. 199 (1968)	40
<u>United States ex rel. Johnson v. Chairman</u> <u>New York State Board of Parole, 500 F.2d</u> <u>925 (2d Cir.), vacated as moot sub nom.</u> <u>Regan v. Johnson, 419 U.S. 1015 (1974)</u>	15,19,25,30,35, 39,46
<u>United States ex rel. Richerson,</u> 525 F.2d 797 (7th Cir. 1975)	16
<u>United States v. Trans-Missouri Freight Assn.,</u> 166 U.S. 290 (1897)	40-41
<u>United States v. W.T. Grant Co.,</u> 345 U.S. 629 (1953)	40
<u>Walling v. Helmerich Payne, Inc.,</u> 323 U.S. 37, 43 (1944)	40

CASESPAGE

<u>Warden v. Marrero,</u> 417 U.S. 653 (1974)	17,25
<u>Williams v. Oklahoma City,</u> 395 U.S. 458 (1969)	48
<u>Willner v. Committee on Character and Fitness,</u> 373 U.S. 96 (1963)	17
<u>Wisconsin v. Constantineau,</u> 400 U.S. 433 (1971)	34
<u>Wolff v. McDonnell,</u> 418 U.S. 539 (1974)	18,19,28,33, 43,46

STATUTESFederal

18 U.S.C. 4214 (1976)	35,37
-----------------------------	-------

New York

Correction Law § 212	18,19
Correction Law § 213	19
Correction Law § 214(4)	33,41,45,47,48
Correction Law § 214(6)	41,45
Correction Law § 827	19
Correction Law § 827(1)	20,22
7 Code of Rules and Regulations § 1900.1(b)	19
7 Code of Rules and Regulations § 1900.05	19
7 Code of Rules and Regulations § 1910.15	19,26
7 Code of Rules and Regulations § 1915	19
Penal Law § 70.00(4)	17
Penal Law § 70.15(1)	17

STATUTES

PAGE

Penal Law § 70.30(2)(b)	17
Penal Law § 70.40(2)	19,42

OTHER SOURCES

Citizens' Inquiry on Parole and Criminal Justice, Inc., <u>Prison Without Walls:</u> <u>Report on New York Parole</u> (Praeger, 1975)	25,32
K. Davis, Administrative Law Text 177 (3d ed. 1971)	21
D. Dressler, <u>Practice and Theory of</u> <u>Probation and Parole</u> (2d ed. 1969)	27
Final Report of the Joint Committee on Prison Reform of the Texas Legislature (1974)	27
Gottfredson et al., <u>Parole Decision Making,</u> (Nat'l Council on Crime and Delinq. 1973)	26
<u>Hearings Before Subcommittee No. 3 of the</u> <u>House Judiciary Committee, 92d Cong.,</u> <u>2d Sess. (1972)</u>	27-28
<u>Hearings on H.R. 1598 Before the Subcomm. on</u> <u>Courts, Civil Liberties, and the Administra-</u> <u>tion of Justice of the House Comm. on the</u> <u>Judiciary, 93d Cong., 1st Sess. (1973)</u>	23
National Council on Crime and Delinquency, <u>Field Services for Offenders in New York</u> <u>State: An Evaluation for the Governor's</u> <u>Special Committee on Criminal Offenders</u> (New York, 1967)	28
Note: Procedural One Process in Parole Re- lease Proceedings, 60 Minn.L.R. 341 (1976)	21

OTHER SOURCES

PAGE

<u>Project - Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810 (1975)</u>	19,28,32
Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature (1974)	27

STATEMENT OF FACTS

Introduction

Five of the named plaintiffs and an additional inmate witness testified for appellees. They were:

1. Gustave Zurak, appellee, who was released from custody in September, 1975.
2. Martin Halpern, appellee, an inmate at the New York City Correctional Institution for Men (NYCCIM);
3. Benjamin Santiago, appellee, an inmate at NYCCIM;
4. Salvatore Zambuto, appellee, an inmate at NYCCIM;
5. Maitland Jones, witness, an inmate at NYCCIM;
6. Willie Mack, appellee, an inmate at the NYCCIM.

Appellants called the following witnesses, each an employee of the New York Department of Correctional Services:

1. Lawrence V. Kavanaugh, New York State Department of Correctional Services, Division of Parole, Assistant Director of Field Operations.
2. Joseph J. Salo, Executive Secretary, New York State Board of Parole.
3. Raymond E. Dorsey, Supervising Parole Officer, New York State Department of Correctional Services, NYCCIM.

Summary of Appellees' Witnesses' Testimony

Appellees' witnesses testified that, during orientation sessions held shortly after their arrival at the receiving institution on Rikers Island, NYCCIM, to begin service of their definite sentences, they were informed about and made application for conditional release. (7a)* At intervals ranging from one month (77a) to four and one-half months (68a) thereafter, five of the witnesses were interviewed by parole officers at the institution. Mr. Jones, sentenced in May 1975, had not received an interview as of the date of his testimony, December 22, 1975, despite his requests for one (85a-86a). Neither he nor appellee Santiago had received a decision on his application by December 22, 1975, approximately six months after filing the application for conditional release (85a-86a; 64a, 72a). Approximately three to over four months after applying for release, appellees Zurak, Zambuto and Mack were denied conditional release (7a, 95a, 100a); Mr. Halpern's application was deferred several months for reconsideration (7a). None of the witnesses were given written statements of the reasons and the evidence relied on in rejecting their applications for release (8a, plaintiffs' exhibits 1-3),

* Numbers in parenthesis refer to the appendix (and supplement).

although Mr. Halpern was told orally that his application had been deferred because he "was a discredit to the community" (57a).

Appellees' witnesses testified without contradiction that an inmate of NYCCIM could not readily ascertain the status of his application or submit additional information regarding the application because it was difficult to contact the parole officers (see, e.g., 54a-55a, 66a-67a) and that applications were often lost (29a, 98a) or buried in stacks of paper and ignored (78a-79a).

At their interviews, the witnesses were not permitted to see the contents of their files (7a, 10a). Interviews typically took 20 to 40 minutes (29a, 55a, 77a), and tended to center upon the facts underlying the conviction (see, e.g., 30a). The witnesses did not know precisely what documents or papers were contained in the files which went before the parole commissioner (see, e.g., 60a-61a). They were not afforded a personal appearance before the commissioner (17a-18a).

After he was denied release, appellee Zurak spoke with Raymond Dorsey, the supervising parole officer at NYCCIM, who was surprised by the decision and did not "understand why he had been denied" (36a). However, when Mr. Zurak appeared in-person before the institutional furlough committee, he learned that the criminal record of "a sex maniac...committed at

Mattawan [sic] State Hospital" had been mistakenly substituted for his own record (37a, 210a). An examination of Zurak's file after the hearing confirmed that his parole file contained another person's criminal record (210a).

Mr. Dorsey also did not understand why appellee Zambuto had been denied release. Mr. Zambuto testified:

I asked him for a reason. He said he didn't have no reasons. The parole board had reasons, but they weren't giving none out.

He said he couldn't understand why I was denied because I had, in his words, I had what the parole board wanted. I had a job waiting, I had a family waiting that cared, I had letters of recommendation in my file....

(81a)

Although Mr. Jones was not even interviewed for conditional release, he applied for and was denied a furlough without a personal interview on the basis of "an alcoholic problem" (89a, 91a). However, he testified that he had no such difficulty (90a).

Appellee Mack, upon denial, wrote Paul J. Regan, the then Chairman of the New York State Board of Parole, asking for reasons for the denial (102a). He was called to the parole office at Rikers Island during the last week in August, 1975 (103a)

to receive Chairman Regan's message in response (102a). Parole Officer Hardy showed plaintiff the letter from the parole board chairman and read it to him. Mr. Mack testified that the chairman refused him reasons for the denial of conditional release, stating in essence that "he didn't have to give [him] any reason. If [he] wanted a reason, [he] should go to the federal court" (84-85).

Summary of Appellants' Witnesses' Testimony

Mr. Kavanaugh testified that he was Assistant Director of Field Operations for the Division of Parole (107a). His testimony concerned general information regarding the conditional release program and procedures and facilities outside New York City.

Mr. Salo, executive secretary to the board of parole (135a), stated that his duties included the scheduling of parole board members and hearing reporters throughout the state (136a). He testified that a panel of board members went to Rikers Island "every week of the month" (150a) to conduct hearings at which inmates appear personally before the board (151a). He acknowledged that the parole board granted alleged parole violators personal appearances at parole revocation hearings (136a, 154a).

The witness described the procedures used upstate with respect to both alleged (indeterminate sentence) parole violators, and alleged (definite sentence) conditional release violators who were housed at local facilities awaiting trial on new charges. With regard to persons charged with violation of parole who were held in local facilities, Mr. Salo testified that they were provided in-person revocation hearings before the board. The following procedure for bringing them before the Board was described:

They are brought into the major correctional facility where the board is sitting, for a one day hearing. They will come in for the same day and after the hearing is concluded they are taken out to the local county jail, if that is where they are housed (152a).

Similarly, upstate conditional releasees from definite sentences who are charged with violations of their conditional release and are housed in a local correctional facility awaiting trial on new charges are afforded violation hearings at which the releasee appears personally before a commissioner of the Parole Board (152a-153a).

The witness also testified that personal appearances are granted for parole release hearings (136a, 154a), parole revocation and hearings to determine the minimum period of imprisonment (M.P.I. hearings) (136a, 155a).

The witness stated that the denial of similar hearings for definite sentence conditional release applicants is based on the absence of explicit statutory mandate (156a). When asked whether--aside from the presence of a statutory provision and the greater length of time prior to eligibility -- there is any difference between a parole applicant eligible for conditional release, the witness said "No, I could see no difference" (156a).

Regarding the content of the parole files upon which the commissioner makes the conditional release determination, the witness stated:

Well, [the commissioner] would have possibly the presentence investigation report, also the parole officer's interview with the inmate, his pre-parole summary, and all of this would include the social history, personal, legal history, what his opportunities are for employment, and what program he is submitting in addition to any recommendation which would be by the legislators, by the judge himself, or interested members of the family, or attorneys (159a).

The standard the commissioners apply in making the conditional release decision was alternately described as:

...formalized....[but] [t]hey have no manual for these criteria as such.... they rely on their experience and on their judgment, as well as a number of factors, some of which are the offense itself, the previous convictions sound guidance (160a).

The witness, maintaining that the current parole board was functioning with less than a full complement of commissioners due to illness and one vacancy, concluded that the current board did not have time to visit all local facilities throughout the state to conduct conditional release hearings (150a).

Raymond Dorsey testified that he was the supervising parole officer at the Rikers Island complex of New York City detention and correctional facilities and, as such, was responsible for administering the conditional release program at Rikers Island (162a-163a). His testimony verified in substantial part that of appellees' witnesses (8a). He stated that conditional release eligibility attached after service of 60 days of sentence, including jail time (166a), and that

many men arrive at Rikers Island with enough jail time to make them eligible almost immediately (166a-167a). The cases are assigned to parole officers for processing "on a random basis" (188a) ... "without regard to the amount of jail time an applicant has spent in a city correctional institution before he was sentenced" (189a-190a), and "without regard to the duration of his sentence" (190a). Mr. Dorsey confirmed the District Court's understanding that "[a] man with a year might be interviewed before one with 90 days" (190a) and indicated that there are no "regulations or rules [to] follow regarding the order in which [new applicants] are interviewed" (188a).

Sometimes the parole officer travels to other institutions to interview applicants, "[b]ut most times the inmate is brought to the officers" (169a). The interview with the parole officer is the sole opportunity for the conditional release applicant to present his case in person. The interviewer takes a history of "the information they wish to supply to the parole officer, and what information we have available from the probation office...is discussed with them" (9a, 164a).

However, the parole officers never show the applicant the contents of the parole file (10a) and the interview is often conducted before receipt of all of the papers that go before the parole board (193a).

No manuals regarding conditional release applications exist (187a), Dorsey testified, and he had never received any "memoranda outlining how interviews are to be conducted by parole officers" (188a). As the District Court found, the "parole officer assumes no responsibility for presenting the inmate's case....the parole officer's report is neutral and everything is left pretty much up to the Commissioner" (18a).

Mr. Dorsey testified that, unlike the upstate practice, there is no post-interview investigation by means of which the parole officer independently verifies information about the applicant (205a-206a).

A typical report prepared by the parole officers at Rikers Island contains a personal history, information related to the conviction, the eligibility date for conditional release, amount of jail time, and a brief description of the offense with "the inmate's response to whether or not he feels he was treated fairly or whether he is guilty, whether he denies or admits his crime" (177a). There is also a summary

of the man's previous record, a social history, and a probation officer's evaluation, along with an indication of his prospective residence and job (177a-180a). Any letters written by friends or other members of the community are also included (178a-179a).

Mr. Dorsey testified that reasons for the denial and deferral of conditional release have been provided to unsuccessful applicants for "about three months" (174a, 193a-194a). As the District Court found, a reasons statement has been provided unsuccessful applicants since September, 1975 (9a-10a). Mr. Dorsey stated that it was his duty to sign the completed statements of reasons written by the commissioners, and that the reasons were in the commissioner's own language. Commenting on standards to be followed in making a decision, he said:

[T]here have been no directives to me or the commissioners as to what guidelines should be followed. It's pretty much an individual decision on his part (190a).

He later specified that there were no rules or regulations, memoranda (204a) or manuals for the commissioners which establish criteria for the evaluation of applicants (205a). In response to the District Court's question whether regular meetings took place with the commissioners "to discuss what

they are seeking, what objectives they have in the 60 day release program and what you ought to guide yourself by," Dorsey answered in the negative (208a).

With regard to a statement of the facts or evidence relied upon in denying conditional release, the defendant acknowledged that "in many instances" the statement might read "you have a long history of arrests and ... your release at this time would be incompatible with the interests of society," and "they don't list what those arrests would be" (198a).

THE PAROLE FILES

The parole files of the inmate witnesses were produced and entered into evidence as exhibits 4 and 5 by stipulation following the hearing of December 22-23, 1975.

Appellee Gustave Zurak's parole file was found to contain the following: (1) a completed "Data Sheet" for conditional release applicants, prepared by parole officer Raymond E. Dorsey; (2) the criminal record of one "Eugene James Czubak"; (3) copies of records of the United States Board of Parole and "Parole Progress Reports" prepared by officials at the Federal Correctional Institution in Danbury, Connecticut;
* Zurak testified that he had provided the federal parole documents to defendants (31a).

(4) various letters of recommendation and other correspondence supplied by Mr. Zurak; (5) his applications for conditional release, one dated November 22, 1974, the other dated December 19, 1974, which notes the application's denial by defendant Commissioner John Maffucci on February 28, 1975; and (6) a "Parole Evaluation Data Sheet" dated November 22, 1974 and bearing Zurak's signature. A pre-sentence report prepared by the New York City Department of Probation was not part of the file. Medical and psychiatric reports were absent from Zurak's as well as from all other files provided plaintiffs.

The files of Benjamin Santiago and Maitland Jones, inmates who testified that they had not received decisions from defendants (72a, 86a), contained incomplete data sheets. Their New York State fingerprint identification reports and pre-sentence reports appeared in the files. Mr. Santiago's July 3, 1975 application for conditional release, and Mr. Jones' June 12, 1975 application* also were included in their respective files.

The parole files of Willie Mack and Salvatore Zambuto, inmates who were denied conditional release, contain completed

* Santiago and Jones each testified that they had applied for conditional release a few days after their arrival at the New York City Correctional Institute for Men (64a, 84a).

"data sheets" prepared by institutional parole officers and letters of recommendation from various persons. Mack's file lacks his pre-sentence report, and Zambuto's lacks his fingerprint report.

The file of the inmate whose conditional release application had been deferred and then granted,* Martin Halpern, contains the data sheet, pre-sentence and violation of probation reports, his fingerprint record, and numerous letters of recommendation.

Following the filing of post-hearing briefs, the District Court on July 20, 1976 granted preliminary injunctive relief for plaintiffs (5a-23a). This appeal ensued.

* Halpern withdrew his conditional release application (59a).

ARGUMENT

POINT I

DUE PROCESS ATTACHES TO THE CONDITIONAL RELEASE DECISION-MAKING PROCESS.

The District Court properly concluded that the procedures followed by appellants in deciding conditional release applications must be guided by minimum due process standards. In arguing that conditional release applicants are not entitled to due process protections because they serve shorter sentences and are less likely to be released than New York State prisoners serving indeterminate sentences, appellants ignore the determinative factor, the nature of the interest involved. That interest - "conditional liberty" - is identical for both the prospective conditional releasee and the prospective parolee. It is the existence of this fundamental interest in liberty that triggers the application of the due process clause.

In United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir.), vacated as moot sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974), this Court held that as parole is treated as a "conditional liberty" entitled to due process protection,

[a] prisoner's interest in prospective parole, or "conditional entitlement," must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration.

Id., 500F.2d at 928

Accord, Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975);
United States ex rel. Richerson v. Wolff, 525 F.2d 797
(7th Cir. 1975); Bradford v. Weinstein, 519 F.2d 728
(4th Cir. 1974), vacated as moot, ___ U.S. ___, 96 S. Ct.
347 (1975); Childs v. United States Board of Parole, 511
F.2d 1270 (D.C. Cir. 1974). See Mower v. Britton, 504
F.2d 396, 397 (10th Cir. 1975).*

The stakes are the same for both the conditional release applicant and the prospective parolee: conditional freedom versus incarceration. For both classes of potential releasees,

...The Board [of Parole] holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial.

Childs v. United States Board of Parole, supra
at 1278.

* The Supreme Court shortly may consider the question of due process applicability to parole release proceedings in Scott v. Kentucky Board of Parole, cert. granted, 44 U.S.L.W. 3358 (1975). However, the Court has reserved for consideration a suggestion of mootness and a motion for leave to substitute named petitioners or, in the alternative, to intervene. The named petitioner has been paroled and because the District Court and Sixth Circuit summarily dismissed the action, no class certification was made.

"Present enjoyment" of the protected interest is not a prerequisite of due process. Bradford v. Weinstein, *supra*, 519 F.2d at 732 n.3. Cf., e.g., Hampton v. Mow Sun Wong, ____ U.S. ____, 44 USLW 4737, 4741 (June 1, 1976) (resident aliens application for employment in federal civil service); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), Konigsberg v. State Bar, 353 U.S. 252 (1957), and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (admission to the Bar); Speiser v. Randall, 357 U.S. 513 (1958) (application for tax exemption); Simmons v. United States, 348 U.S. 397 (1955) (application for draft exemption); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (application for admission to practice before Board of Tax Appeals). See also Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (application for a liquor license).

Appellees' interest in conditional release is indeed substantial.* Members of appellees' class may face up to two years of incarceration, not the one year appellants erroneously assert. (Appellants' brief at p.13-14.) Although the maximum single definite sentence which may be imposed in New York State is one year, New York Penal Law §§70.00(4), 70.15(1), a person sentenced to two or more definite sentences may be required to serve an aggregate term of up to two years of imprisonment. New York Penal Law, §70.30(2)(b).

*"[O]nly an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole." Warden v. Marrero, 417 U.S. 653, 662 (1974). So too must an inmate denied release believe he is suffering a penalty, especially since he knows that other prisoners are being conditionally released.

Appellants' suggestion that appellees suffer a less substantial "loss" than persons serving indeterminate sentences and therefore are not entitled to due process protection is without merit. First, a prospective parolee often will "owe" less than two years on his sentence when he is considered for parole. For instance, a person sentenced to an indeterminate term of 1 1/2 to 3 years will not be considered for parole until he has less than 18 months left to serve on his sentence. Again, the parole board may under the governing statute (N.Y. Correction Law §212) choose to consider an inmate's application for parole release only once every two years after the inmate becomes eligible for parole; thus an inmate serving an indeterminate term of 1 to 5 years may, following four years of imprisonment, appear before the board with just one year of his sentence to serve.* Therefore, at the time each is considered for release, the prospective conditional releasee and the prospective parolee

* Although such an inmate may be released mandatorily earlier because of his accumulation of "good time credits", those credits may be revoked, of course only in a manner consistent with due process. Wolff v. McDonnell, 418 U.S. 539 (1974).

Also, indeterminately sentenced inmates often are considered for parole but a few months before they are to be released to parole mandatorily. Appellants' argument would lead to the conclusion that these inmates would not be entitled to due process protection because only a few months of liberty were at issue. Their argument inexorably leads to the conclusion that prisoners who are repeatedly denied release eventually lose due protection as the ends of their sentences near.

may face the same length of incarceration if denied release. See, in general, New York Correction Law, §212; New York Penal Law, §70.40(2).*

Second, it is the existence of a "liberty" interest that determines whether the due process clause should be invoked, not the length of the liberty involved. That liberty interest extends even to imprisoned persons:

"There is no iron curtain drawn between the Constitution and the prisons of this country....Prisoners may claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law."

Wolff v. McDonnell, 418 U.S. 539, 555-6 (1974).

The holding of United States ex rel. Johnson v. Chairman, supra at 928 hinged upon the identification of that liberty interest, not its length.** As appellants have recognized, (although they have misapplied the principles, see appellants' brief at 16), one must look to the nature, not the weight of the interest at stake. Although a "weighing process" is a part of the determination of the "form of the hearing required in

* Except for the time at which each is eligible for release to supervision and the procedures followed in deciding whether to release him, the conditional releasee and the parolee are treated identically by the State. They are evaluated for release in accordance with identical standards and criteria. N.Y. Correction Law §§213, 827; N.Y. Penal Law §70.40(2). See 7 N.Y.C.R.R. §§1900.1(b), 1900.5, and 1910.15. The parolee and the conditional releasee are subject to the same release conditions and are supervised by the same authorities. N.Y. Correction Law §§212, 827; 7 N.Y.C.R.R. §1915.

** The deprivation of prospective liberty by the revocation of "good time" of only a few days mandates due process protection. Wolff v. McDonnell, supra. In general, see Project-Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 849-51 (1975) [hereinafter denoted Yale Project].

particular situations by procedural due process,"

[T]he constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process.

Board of Regents v. Roth,
408 U.S. 564, 570-1, and n.8
[emphasis in original].

The District Court properly rejected appellants' argument that because but one in three applicants are granted release they are not entitled to due process protections, explaining:

It is the New York Penal Law §70.40(2) that posits in the inmate serving a definite sentence, an expectation of freedom after sixty days of incarceration, and that expectation cannot be qualified as warranting or not warranting due process protection based upon fulfillment percentiles pursuant to Parole Board action.

(20a)

The probability of success at such a hearing may not properly serve as the basis for the claim of an interest subject to due process protection:

A claim of entitlement, to be cognizable for due process purposes, can rest on less than a statutory guarantee of a particular result. Thus, a cognizable claim of entitlement is embodied in the parole process in the form of both a statutory right to consideration for parole and an expectation of, or a conditional entitlement to, release.

Consideration for parole is guaranteed by statute in virtually all jurisdictions. Since these statutes "support claims of entitlement" to consideration for parole release, it ineluctably follows from the Court's analysis that they create a protected property interest. An inmate within the statutorily defined class of those eligible to be considered for parole is

therefore entitled to procedural due process.

Note: Procedural Due Process in Parole Release Proceedings,
60 Minn. L.R. 341, 349 (1976)
[emphasis in original; footnotes omitted].

Conditional release is not an "ad hoc exercise of clemency." (See New York Correction Law § 827(1).) "[T]he practice of releasing prisoners [to supervision] before the end of their sentences has become an integral part of the penological system." Morrissey v. Brewer, 408 U.S. 471, 477 (1971). That release is not guaranteed is of no consequence. See Bradford v. Weinstein, supra at 731-2, and n.2. Professor Davis has observed that "one who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity." K. Davis, Administrative Law Text 177(3d ed. 1971).

Constitutional rights do not rise or fall on the basis of statistics. If one were to accept appellants' reasoning, conditional release applicants in local facilities near Albany would be entitled to due process protection because over 50% of their applications are granted, (Defendants' exhibits A and B.), but not New York City applicants whose success rate is less.

Because conditional release is a statutorily provided alternative to incarceration, the recent Supreme Court decisions in Meachum v. Fano, ___ U.S. ___, 49 L.Ed. 2d 451 (June 25, 1976) and Montanye v. Haymes ___ U.S. ___, 49 L.Ed.2d 466

(June 25, 1976) are inapposite. In these cases the Supreme Court concluded that there was no liberty or property interest sufficient to invoke the protections of the Due Process Clause because "state law does not condition the authority to transfer on the occurrence of specific acts of misconduct or other events...." Meachum v. Fano supra at _____, 49 L.Ed. 2d at 458. Prison officials therefore have discretion to transfer inmates for any reason or for no reason at all. Id at _____, 49 L.Ed. 2d at 461.

In the instant case appellees have "some right or justifiable expectation rooted in state law" that they will be released to supervision if they meet the standards of the Parole Board. Montanye v. Haymes, supra at _____, 49 L.Ed.2d at 471. The practice of releasing inmates to supervision before the end of their sentence is an integral part of New York State's penological system. See Morrissey v. Brewer, supra at 477. It is the policy of the Parole Board and implicit in the statutes that eligible inmates who the Board believes "will live and remain at liberty without violating the law, and...[whose] release is not incompatible with the welfare of society" will be released to parole supervision.* New York Correction Law §827(1). See, Perry v. Sinderman,

* Antonia Scalia, Chairman of the Administrative Conference of the United States, has indicated:

Parole cannot be viewed as simply a windfall, because in fact the entire penal system is premised on its availability. Congress prescribes maximum

[footnote continued
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408 U.S. 593, 601 (1972). Thus, because a definite-sentenced inmates is entitled to release consideration, and the release decision - guided by the standards set forth by statute and regulation - creates an expectation of, or conditional entitlement to, release, his interest merits due process protection.

* [footnote continued]

sentences and judges sentence individual defendants with the knowledge that parole is available....Grants of parole are not a series of random acts, but a major and regular part of the administration of our system of criminal justice.

Hearings on H.R. 1598 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong. 1st Sess., ser. 25, at 163-64 (1973)

POINT II

THE MINIMAL DUE PROCESS
SAFEGUARDS IMPOSED UPON
APPELLANTS WERE PROPER.

Once it is determined that conditional release proceedings qualify for due process protection, "the question remains what process is due." Morrissey v. Brewer, *supra* at 481. The "right to be heard before being condemned to suffer grievous loss of any kind...is a principle basic to our society." Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring). Furthermore, "[a] state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). See Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972); Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The degree of formality and the procedural requisites of a hearing may of course vary in accordance with the interests affected. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1971); Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313 (1950).

In Matthews v. Eldridge, ___ U.S. ___, 47 L. Ed. 2d 18, 33 (1976), the Supreme Court set forth three factors which should be considered in assessing what process is due. Here, appellees' conditional liberty is the "private interest that will

be affected by the official action." Id. For the inmate that interest in release is extraordinarily high. The release decision is "one of the most critical decisions that can affect his life and liberty." United States ex rel. Johnson v. Chairman, supra, 500 F. 2d at 928. See also Citizens' Inquiry on Parole and Criminal Justice, Inc., Prison Without Walls: Report on New York Parole, 46 (Praeger, 1974); Warden v. Marrero, supra, 417 U.S. at 662-3. A favorable decision may result in the conditional release applicant's spending up to 21 months of an aggregate two-year term at conditional liberty rather than in prison. See Point I, supra at p. 17. This conditional freedom "includes many of the core values of unqualified liberty.... By whatever name, the liberty is valuable...." Morrissey v. Brewer, supra at 482.

The second factor which requires consideration is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Matthews v. Eldridge, supra at 33. As the District Court found, the "present administration of the conditional release program on Rikers Island is chaotic" (15a). No memoranda or other written guidelines outlining how interviews are to be conducted exist (10a).

Because the "interviewing officer does not show the contents of the inmate's file to the applicant" (10a), mistakes in information as basic as the applicant's criminal record occur (18a, 210a). No independent investigation of any of the file information is conducted (17a). An inmate's interview may be conducted before the receipt of all information in his file, further heightening the chance of erroneous information being included and thus a misinformed decision being made (193a). No evaluation of the applicant is made by the interviewing officer (9a, 18a), further removing the decider from the factual matrix.

The release decision is predicated upon an analysis of primarily factual information (159a). (See & N.Y.C.R.R. §1910.15.) Yet, experienced judges, scholars and observers confirm that "[e]verybody...who is closely connected with the processing of offenders knows that the recording of information is not treated with any great respect." Gottfredson et al., Parole Decision Making, 49 (Nat'l Council on Crime and Delinq. 1973).*

* The literature and case law are replete with documentation of such errors. cf. Franklin v. Shields, 399 F. Supp. 309, 313 (W.D. Va. 1975) (finding of fact that Virginia Parole Board relies on factually erroneous information never verified by the Board); Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation,

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Under the present procedures, the probability of an "erroneous deprivation" is high because of reliance on incorrect or insufficient information. As the Court recognized in In re Gault, 387 U.S. 1 (1967):

...[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.... Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

Id. at 18-19.

* (footnote continued from previous page)
that petitioner would ally with father if released, insufficient basis for parole denial); In re Rodriguez, 14 Cal. 3d 639, 537 P. 2d 384, 122 Cal. Rptr. 552 (1975) (file material, later proven in error, led parole officers to believe that prisoner, a nonviolent sex offender, had violent tendencies. 14 Cal. 3d at 648 n. 14; parole evaluation asserted that "family rejected him," when in fact prisoner had a home and employment in family business waiting for him. Id. at 651 n. 16); State v. Pohlabel, 61 N.J. Super. 242, 160 A. 2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); D. Dressler, Practice and Theory of Probation and Parole 115-16 (2d ed. 1969) (files often contain incomplete and erroneous information); Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, 88, 91 (1974) (denial of parole, because of failure to utilize educational programs, by board member unaware that no such programs then existed at unit which prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); Final Report of the Joint Committee on Prison Reform of the Texas Legislature 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d. Sess. at 451 (1972) (testimony of Dr. Willard Gaylin) ("I have seen

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See Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion).

The third factor to be considered is the government's interest. Both the State and appellees have interests "in the accurate finding of fact and the informed use of discretion," (Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973)), and "a further interest in treating the parolee with basic fairness...." (Morrissey v. Brewer, supra at 484). The State's other concerns center around prison management, see Wolff v. McDonnell, supra at 561-63, and the administrative and fiscal burden imposed by the District Court's order. However, these later concerns must be put into their proper perspective. In Breed v. Jones,

* (footnote continued from previous page)
black men listed as white and Harvard graduates listed with borderline IQ's."); Yale Project at 834 n. 107 (erroneous listing of a prisoner's brother's conviction as his).

In New York, staff members of the National Council on Crime and Delinquency concluded in a 1967 study of the New York State Correctional institutions:

Social case studies, pertaining to the background and life experiences of the individual prior to commitment, related the bare facts well, but were otherwise sterile and revealed little or no attempt to analyze the interpersonal relationships of the individual or their impact on him. Causative factors and problem areas were not identified, and meaningful treatment plans were not set forth....

* * *

The implications of the above findings are: (1) The Board of Parole is not getting the quality of records needed to assist them in the decision-making process;....(3) institutional and field staff involved in the diagnostic and treatment process are either overloaded, unskilled, or lacking proper direction and supervision.

National Council on Crime and Delinquency,
Field Services for Offenders in New York State: An Evaluation for the Governor's Special Committee on Criminal Offenders (1967)

421 U.S. 519 (1975), for example, the Court acknowledged that its holding may place some added burden on authorities and diminish the flexibility and informality of juvenile proceedings, but replied:

Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government....

Id. at 535 n. 15

See Gagnon v. Scarpelli, supra at 782 n. 5 ("some amount of disruption inevitably attends any new constitutional ruling."). Inadequate resources or finances cannot excuse encroachment upon constitutional rights. See Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F. 2d 392, 399 (2d Cir. 1975).

The burden placed on the State by the District Court's order is minimal. The parole board regularly travels to the Rikers Island facilities to conduct in-person hearings with inmates on a weekly basis.* Because 80% of the applicants are housed at NYCCIM and rest are already transported there to see the

* Appellants, in support of their argument, have dwelled pre-dominately with the burden that would result if the parole board was required to travel to 63 local institutions outside New York City. See appellants' brief at 20. First, the relief ordered applies only to New York City inmates. Because different procedures are employed by the upstate parole officers in the gathering and processing of information (111a-115a, 205a-206a) than at Rikers Island and the possible transportation problems involved upstate, it is by no means clear that the affirmance of the District Court's order would inexorably lead to the requiring of an in-person hearing outside New York City. No testimony was taken which

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parole officers (169a), no extra travel has been imposed on the parole board. Appellants have asserted only in a conclusory manner that the parole board, operating in 1975 without a full complement of commissioners because of illness and vacancies, would not be able to handle any additional hearings. No evidence was introduced to show that a full parole board of twelve working commissioners would find itself unduly burdened by appearances of an extra 25 applicants per week (191a) at Rikers Island. Nor was any serious attempt made to describe in concrete terms the additional time or costs involved in providing such appearances. (See testimony of Joseph Salo, 149a-150a)

Obviously, since appellants voluntarily have given written statements of reasons to unsuccessful applicants since September, 1975 (see Point IIB, infra at p.39), the District Court's order imposed no new burden. See United States ex rel. Johnson v. Chairman, supra, 500 F. 2d at 933-4. The District Court's order that applications be considered in a timely and orderly

* (footnote continued from previous page)
showed that upstate - unlike New York - conditional release applications were not being processed in a timely manner (see 122a-123a, where testimony was given showing that upstate applications are "generally" completed on time). Thus, consideration of the possible burden caused by the extension of the District Court's order to inmates outside New York City is wholly irrelevant to the issues.

Further, even if consideration of the situation outside New York City is appropriate, the parole board would not have to travel to the local facilities. Locally-housed inmates could be brought to it for a hearing along with the other inmates from local facilities who are transported for revocation or other in-person hearings. See (152a-153a).

fashion also imposed no additional burden. The testimony showed that applications could be processed within the time periods set by the District Court (16a, 165a). Orderly consideration of application does not affect the number of applications but requires only the institution of simple procedures to insure that applications are no longer considered at random.

Weighing the interests involved, appellees submitted that due process mandates the very minimal procedures ordered by the District Court.

A. The District Court Properly Imposed Upon Appellants The Requirement Of A Personal Hearing.

The District Court concluded:

The testimony adduced at the hearing demonstrated unequivocally that the conditional release applicant is not receiving fair treatment....Fundamental fairness cannot be achieved under present procedures for processing conditional release applications unless the inmate-applicant is given the opportunity to appear in person before the Board and to discuss his case with the Commissioner.
(17a-18a)

It is clear that without this personal hearing, an applicant lacks any realistic opportunity to persuade the commissioner,

that he deserves release. See (17a-18a).^{*} Further, since
^{*} The District Court observed that because the interviewing parole officer's report is neutral,

...the safest way for the inmate to get his case across is through personal interview. [If] [t]he parole officer can't make an evaluation, he really has been denied, it seems to me, a right to put his case before the person making the decision (201a).

appellees are not granted access to their files to correct or rebut erroneous and adverse information therein, it is essential that the inmate be permitted to appear before the decision-maker to discuss the factors relative to the release decision.

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra at 268-9. Here, as the Supreme Court has recognized, appellees - prisoners - as a class include "a high percentage of persons who are totally and functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." Johnson v. Avery, 393 U.S. 483, 487 (1969). See Gagnon v. Scarpelli, supra at 486-7; Yale Project, 84 Yale L.J. at 864. Thus, the alternative of allowing written submissions is not practicable here.*As the court in Bradford v. Weinstein, supra at 732 stated:

We think it would be a grievous loss for a prisoner by reason of a completely ex parte proceeding, and the resulting increased opportunity for committing error, to be denied

* Whether written submissions are even considered is unclear. See (18a); Citizens Inquiry on Parole and Criminal Justice, Inc., Prison Without Walls - Report on New York Parole, supra at 44.

parole and required to serve more of his term because the attention of the parole board was not called to data tending to indicate that parole should be granted....

Moreover, because an inmate-applicant is denied access to his file, because the interview with the parole officer is often conducted before the receipt of the documents and records which are included in his file, and because no independent investigation of the information in the file is conducted, the in-person hearing offers the applicant his only opportunity to discover and rebut erroneous and unfavorable information in the file.* At a hearing, he would be questioned about information important to the decision-makers, be able to ask questions, and be allowed to point out errors. See New York Correction Law §214(4) ["The board of parole...shall have the prisoner appear...and shall personally examine him and check up so far as possible the reports made by prison wardens and others...."]

A personal hearing has been recognized as a fundamental requisite of due process in various contexts. See e.g. Goss v. Lopez, 419 U.S. 565 (1975) (suspension of public school students); Wolff v. McDonnell, supra (prisoner disciplinary proceedings); Taylor v. Hayes, 418 U.S. 488 (1974) (summary contempt proceeding);

* Plaintiff Zurak learned that someone else's criminal record had been substituted for his in his file when he appeared personally before the furlough committee at Rikers Island and was questioned by the Committee. (37a-38a).

Morrissey v. Brewer, supra (parole revocation proceedings); Goldberg v. Kelly, supra. See, in general, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971). "A personal confrontation [at release proceedings] protects an individual from suffering a 'grievous loss' by minimizing the risk that public officials will reach a decision based upon unexplained or mistaken facts." Franklin v. Shields, 399 F. Supp. 309, 316 (W.D. Va. 1975). See Cardaropoli v. Norton, 523 F. 2d 990, 996 (2d Cir. 1975).

As presently administered, there is no meaningful equivalent to a personal appearance in the conditional release proceeding. In Matthews v. Eldridge, supra, the Supreme Court concluded that there were appropriate safeguards in the disability insurance benefits program's procedures to obviate the need for a personal hearing before the cessation of payments. There, if the recipient failed to meet his burden of establishing a medical disability, he was provided with a summary of the evidence and a statement of reasons for the tentative decision to terminate payment. Before termination, the recipient could submit additional evidence or arguments to challenge the tentative conclusion's correctness or the accuracy of the evidence it cited in support. He had "full access" to the information in his file. Id. at ____, 47 L. Ed. 2d at 39-40. Further, since the

decision turned upon "routine, standard, and unbiased medical reports by physician specialists....information typically more amenable to written than to oral presentation," there was little utility for a pre-termination in-person hearing.* Finally, since the wrongfully terminated recipient was entitled to full retroactive relief if he prevailed after the evidentiary hearing or judicial review and unlike the welfare recipient in Goldberg v. Kelly, supra, he retains access to many potential sources of temporary income, there is less reason to require an evidentiary hearing. Id. at ____, 47 L. Ed. 2d at 36-37.

In contrast, appellees have no access to information in their files and are not given "tentative" determinations. The decision turns not on medical evidence, but on a "predictive and discretionary" judgment based on the evaluation of numerous factors in light of a broad, extremely vague standard. Morrissey v. Brewer, supra at 477-8, 480; United States ex rel. Johnson v. Chairman, supra at 929. Finally, if the decision is erroneous, appellees lose an interest that can never be restored retroactively to an individual - liberty -

* Significantly, the Court noted that recipients had a right to a full evidentiary hearing and judicial review after termination. Id. at ____, 47 L.Ed. 2d at 41-42.

not the money property in Eldridge. Thus, the considerations in Eldridge which permit the dispensing with the in-person hearing until after termination are absent here.

Likewise, in Shepard v. United States Board of Parole, ____ F. 2d ____ (2d Cir., slip op. at 5413, September 7, 1976), this Court held that a federal parolee incarcerated at a state prison for a crime committed on parole was not entitled to an in-person evidentiary hearing prior to the conclusion of his intervening confinement if provided with certain extensive safeguards, holding that:

Shepard's due process rights would have been met had he been afforded (1) the safeguards now mandated by 18 U.S.C. §4214, (2) full and timely disclosure of the evidence to be considered against him, and (3) a specific statement of the factual findings and reasoning underlying the decision arrived at concerning his detainer.

Id. at ____, slip op. at 5425

The "safeguards" of 18 U.S.C. §4214 are significant, and find no counterpart in the case at bar:

[W]hatever error may occur in the absence of [an in-person hearing] is minimized by the procedural rights guaranteed the parolee under this decision and

18 U.S.C. §4214. Since §4214 ensures the parolee assistance of counsel, a hearing is not needed to remedy his possible inability to express himself effectively on paper. See Matthews v. Eldridge, ____ U.S. ____, 44 U.S.L.W. 4224, 4232 (Feb. 24, 1976), distinguishing Goldberg v. Kelly, 397 U.S. 254, 269 (1970). And the fact that the parolee's written review application lacks some of the flexibility of an oral presentation is to a large extent compensated for by his right to prepare the application, with assistance of counsel, with knowledge of all evidence to be considered against him. See Eldridge, ____ U.S. at 44 U.S.L.W. at 4232, distinguishing Goldberg, 397 U.S. at 269. Moreover, the core of the factual findings upon which the review of the parolee's detainer is based is conclusively established by his intervening conviction. Morrissey v. Brewer, 408 U.S. at 490; compare Cardaropoli v. Norton, 523 F. 2d 990 (2d Cir. 1975).

Id. at ____, slip op. at 5426-7.

Appellees have none of the protections offered by §4214 and are not granted "full and timely disclosure" of adverse evidence.

The decision to grant or deny release is a difficult decision which requires consideration of numerous factors, from historical fact to the inmate's motivations, sincerity and future plans. The State's important interest in the reliability of decision-making is enhanced by a personal hearing. Franklin v. Shields, supra at 316. Inmates such as

plaintiff Zurak, whose file contained buried within it an exceedingly strong recommendation by federal authorities that he be paroled*, need an opportunity to call such information to the attention of the commissioners deciding their cases and to correct erroneous information. The District Court properly concluded that an in-person hearing was essential to the fair consideration of appellees' applications for release.

* Zurak was paroled from federal prison to a New York detainer warrant to serve his term in New York City. The U.S. Parole Board decision granting him parole read, in summary:

After consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted because of your excellent institutional adjustment and the very strong opinion of the institutional staff that this is the appropriate time for parole and that your chances for parole success are at a zenith at this time.

U.S. Board of Parole, Notice of Action re: Gustave Zurak (said notice was included in Zurak's parole file, pl's exhibit 4)
[emphasis supplied]

Since the parole commissioner spends only a few minutes with each file (191a-192a), it is likely that the file review is limited to a reading of the inmate data sheet and a review of the inmate's criminal record (which in Zurak's file was erroneous). A close reading of all the papers included in the file is unlikely.

B. The District Court Properly Ordered Appellants To Provide Appellees With A Statement Of Reasons And Evidence Relied On If The Conditional Release Is Denied Or Deferred.

In United States ex rel. Johnson v. Chairman, supra at 934-35, this Court ordered that prisoners denied parole release be given a statement of reasons and the evidence relied on in reaching that decision by the paroling authority. Reinstating in Haymes v. Regan, 525 F. 2d 540, 544 (2d Cir. 1975), this Court held:

To satisfy fundamental due process requirements and render unnecessary the disclosure of release criteria, the statement of reasons should enable the reviewing body to determine whether parole has been denied for an impermissible reason, or indeed, for no reason at all. Although a trial-type hearing and detailed findings of fact are not required, such a statement must evince the Board's consideration of relevant factors. United States ex rel. Johnson, supra, 500 F. 2d at 934. Moreover, it must provide the inmate with both the grounds for decision to deny him parole, and the essential facts from which the Board's inferences have been drawn. Id.

Given the fact that not even the supervising parole officer at Rikers Island, witness Raymond Dorsey, knew what "criteria... parole commissioners use in making a decision" whether to grant a conditional release application (196a), the need for a statement denial remains high. United States ex rel. Johnson v. Chairman, supra at 930; Haymes v. Regan, supra at 543-4.

The testimony at the evidentiary hearing was conflicting as to whether and for how long appellees have been providing unsuccessful applicants with a "reasons" statement. See (112a, 174a) The District Court found that since September, 1975, after the filing of the instant action, appellees began to provide inmates with such statements (9a-10a). However, this does not render this issue moot. The mere promise to change one's practices "does not operate to remove a case from the ambit of judicial power." Walling v. Helmerich Payne, Inc., 323 U.S. 37, 43 (1944); Boyd v. Adams, 513 F. 2d 83, 89 (7th Cir. 1975); Carey v. White, 375 F. Supp. 1327, 1330 (D. Del. 1974). Emphatically cautioning against a holding of mootness where allegedly illegal conduct had ceased, the Supreme Court held:

"...voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. (citations omitted) A controversy may remain to be settled in such circumstances...e.g., a dispute over the legality of the challenged practicesThe defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.

" United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

Accord, Allee v. Medrano, 416 U.S. 802 (1974); United States v. Concentrated Phosphate Export Assn. 393 U.S. 199 (1968); United

States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897).

Appellees suggest that the passage of New York Correction Law §214(6) eliminates the need for injunctive release (appellees' brief at p. 19). However, by its terms, section 214 applies only to parole release proceedings, not conditional release proceedings. Indeed, were Section 214 applicable to the conditional release process, appellees would have been provided with personal hearings pursuant to subdivision 4 which appellees strenuously oppose. Thus, there is no guarantee whatsoever that appellees will not resume their prior practices.

Finally, throughout these proceedings appellees have opposed the granting of the requested relief and have appealed from every portion of the order entered below. Appellees thus have consistently maintained that it is not unlawful to fail to provide unsuccessful applicants with a reasons statement. Especially since the change in practice is of such recent vintage, see Cypress v. Newport News General and Nonsectarian Hospital Assn., 375 F. 2d 648, 658 (4th Cir. 1967), injunctive relief is appropriate here. See N.L.R.B. v. Raytheon, 398 U.S. 2d (1970); Gray v. Sanders, 372 U.S. 368 (1963); Boyd v. Adams, 513 F. 2d 83 (7th Cir. 1975) (where even a State Attorney General's memorandum forbidding alleged misconduct deemed insufficient to assure against resurrection of past practices); Lankford v. Gelston, 364 F. 2d 197 (4th Cir. 1966) (despite the issuance of a policy statement by police and replacement of the police commissioner, injunctive relief necessary because of the "grave character of the [police] department's [illegal] conduct". Id. at 203.).

C. The District Court Properly Ordered That Conditional Release Applications Be Considered In A Timely And Orderly Manner.

The District Court found that the Administration of the conditional release program at Rikers Island is "chaotic" (15a). Applications are considered well after the individual inmate's eligibility date and without regard to the eligibility date. Although New York Penal Law §70.40(2) provides that inmates are eligible for release after service of 60 days of their sentence (including "jail time"), the District Court properly concluded that the statute requires that

...procedures be instituted which will result in [Parole Board] consideration within a reasonable time after the 60th day when the inmate becomes eligible for conditional release....[T]he legislature must have intended and contemplated reasonably prompt action on these applications by the parole staff and by the Parole Board.

(15a-16a)

The delays found by the District Court deny appellees due process. Administrative delay which causes an applicant to be deprived of benefits he might otherwise be receiving raises substantial due process questions. Andujar v. Weinberger, 69 F.R.D. 690, 694 (S.D.N.Y. 1976); Perez v. Lavine, 378 F.Supp. 1390, 1395 (S.D.N.Y. 1974); Nelson v. Sugarman, 361 F. Supp. 1132, 1136 (S.D.N.Y. 1972). "Property may be as effectively taken by long-continued and unreasonable delay..." in adjudicating a claim. Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926).

The delay in consideration of applicants unreasonably beyond their eligibility dates is tantamount to a denial of conditional freedom itself. "[T]he postponement of [an inmate's] parole can constitute a 'grievous loss' of his 'liberty' or 'property' within the contemplation of the due process clause." Shepard v. United States Board of Parole, supra, slip op. at 5421. The haphazard procedure followed by appellants, by virtue of its arbitrariness, deprives appellees of due process by further preventing reasonably timely consideration of the applications of some members of the class herein (See 8a). "[A] person's liberty is...protected, even when the liberty is a statutory creation of the State....against arbitrary action of government...." Wolff v. McDonnell, supra, 418 U.S. at 558.

Moreover, it was proper for the District Court to consider appellees' claim that appellants' failure to timely consider their applications for release denies them their statutory rights. Since appellees' presented substantial constitutional issues and the claims derive from a common nucleus of operative fact, the District Court properly considered the pendant statutory claim. Hagans v. Lavine,

415 U.S. 528 (1974); United Mine Workers v. Gibbs, 383 U.S.
715 (1966).*

* Appellants' reliance on Rizzo v. Goode, ___ U.S. ___, 44 USLW 4095 (Jan. 21, 1976) is misplaced. The Supreme Court's holding in Rizzo was limited to the facts of the case, for there was no "live controversy" or showing of an unconstitutional deprivation implemented by state authorities. Id. at ___, 44 USLW at 4098-4100. The Court's comments on the intrusion of the District Court into procedures of the police department which were so tenuously related to the pleaded unconstitutional acts must be viewed in light of these factual findings.

Appellants' reliance on Cruz v. Beto, 405 U.S. 319 (1971) is puzzling, for although the Court made the obvious observation that federal courts do not supervise prisons, it reversed and remanded the matter for a hearing on the constitutional issues pleaded, reaffirming that federal courts do sit "to enforce the constitutional rights of all 'persons,' including prisoners." Id. at 321.

POINT III

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT MANDATES A PERSONAL APPEARANCE BEFORE THE PAROLE BOARD FOR CONDITIONAL RELEASE APPLICANTS AT RIKERS ISLAND AND AN ADEQUATE WRITTEN STATEMENT OF REASONS IF RELEASE IS DENIED.

Inmates serving indeterminate sentences and applying for parole release are accorded a personal appearance before the Parole Board, pursuant to Correction Law §214(4)-(5). They are also entitled to a written statement of reasons if release is denied. (Correction Law §214[6]). No similar statutory provisions have been made for persons serving definite sentences, and inmates serving such sentences and applying for conditional release are merely granted a file review by a single commissioner who has no direct contact with either the inmate himself or the interviewing parole officer. (See 17a-18a). Significantly, appellants' own witness, Joseph Salo, Executive Secretary to the Parole Board, admitted that aside from the existence of a statute requiring a personal appearance for parole applicants, there appeared to be no difference between parole applicants and conditional release applicants which justified granting the one group a personal appearance while denying it to the other. (14a, 156a).

Unlike parole applicants, conditional release applicants have no opportunity to correct or refute inaccuracies in the parole file, no opportunity to check for completeness or emphasize

what may be the most significant factors militating in favor of release, and no opportunity to introduce the human individual into the determination which may lead to his conditional freedom. This difference in treatment creates a classification which deprives conditional release applicants of equal protection of the laws. Such classification is constitutionally sanctioned only upon a showing of a compelling governmental interest or, in some cases, of a rational basis for the distinction. No such showing has been made by appellants.

In the case before the Court the classification affects appellees' liberty, clearly a fundamental right recognized under the Fifth and Fourteenth Amendments. That the liberty is conditional rather than absolute is of no moment. See United States ex rel. Johnson v. Chairman, supra, 500 F.2d at 928. Nor does the fact that the interest in liberty was created by statute diminish the protection required by the Constitution of that right. See Wolff v. McDonnell, supra, 418 U.S. at 558. A statutory classification affecting "fundamental rights" will encounter strict scrutiny by a reviewing court and will not pass constitutional muster unless justified by a "compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969) [emphasis in original]; Oregon v. Mitchell, 400 U.S. 112, 247 n. 30 (1970) [opinion of Brennan, White, and Marshall, JJ.]

Appellees seek procedures which assure that the conditional release decision will be made on the basis of "verified facts and that the exercise of discretion will be informed. . . ." Morrissey v. Brewer, supra at 484. New York has recognized its stake in assuring that parole release decisions are relatively error-free and fairly made by the enactment of Correction Law §214. Its interest in conditional release matters is identical, and such interest is furthered by the proceedings mandated by the District Court in this case.

Given the benefit of a personal appearance for a parole or conditional release applicant, appellees assert that the failure to afford persons serving a definite sentence an appearance, while allowing persons serving indeterminate sentences that opportunity, must be justified by a compelling state interest because the discriminatory classification affects a fundamental right, liberty. The discriminatory treatment suffered by appellees however, violates even the "rationality" test of the Equal Protection Clause:

The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out. . . . [I]n defining a class subject to legislation, the distinctions that are drawn [must] have "some relevance to the purpose for which the classification is made."

Rinaldi v. Yeager, 384 U.S.
305, 309 (1966) [emphasis added]

In the case at bar, there has been no showing of any distinction between parole applicants and conditional release applicants sufficient to justify disparate treatment of the two classes of applicants. See Point I, supra at p.19, ftn.*, and Point II, supra at p28-31.

Nor may different treatment be justified on the basis that most persons serving definite sentences are misdemeanants, while those serving indeterminate sentences are felons. When determining differences in treatment of felons and misdemeanants, the courts have consistently cast aside the labels "felons" and "misdemeanants" and instead have looked to the nature of the crime and collateral consequences. Argersinger v. Hamlin, 407 U.S. 25 (1972); Mayer v. City of Chicago, 404 U.S. 189, 195-196 (1971); Groppi v. Wisconsin, 400 U.S. 505 (1971); Baldwin v. New York, 399 U.S. 66 (1970); Williams v. Oklahoma City, 395 U.S. 458, 459 (1969). In terms of the deprivation of liberty they face, inmates eligible for conditional release in fact may be in the same position as felons serving indeterminate sentences. See Point I, supra at p.17-18.

The distinction attempted by appellants, based on the assumption that little new information is available to the Parole Board beyond that available to the sentencing judge, is unwarranted. In the instances of both appellees Zurak and Mack, definite sentences had been imposed while they were in the custody of another jurisdiction, considerably prior to the

time their conditional release application were reviewed by the Parole Board. Changes post-sentence in each applicant's situation should enter into the decision to grant or deny conditional release, but neither Zurak nor Mack was afforded an opportunity to apprise the decision-maker of such post-sentence developments.

Although it appears that reasons have been provided for the denial of conditional release since September 1975, they are provided only at the grace of the Parole Board. It is notable that although the provision of the Correction Law applies only to those parole applicants who have appeared before the Board, as provided for in Corr. L. §214(4), the Parole Board has overlook the "distinguishing characteristics" and provided reasons for denial to conditional release applicants as well. (See Point II.C, supra.)

There is, in sum, no rational basis for the discriminatory treatment afforded conditional release applicants. As recently articulated in Reed v. Reed, 404 U.S. 71, 75-76 (1971), the Equal Protection Clause denies States

. . .the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, (1920).


[emphasis supplied]

The Board of Parole exercises the same function as to both inmates serving definite sentences and those serving sentences of indeterminate length to decide whether their release would be "incompatible with the welfare of society" and whether they would "remain at liberty without violating the law." There is no rational basis for treating one class differently from the other because the governmental interest is identical--to determine whether an inmate can be restored to a normal and useful life in society. In both cases, the State's interest is to insure that the decision is rational and based on correct information. Because New York has given persons serving indeterminate sentences the rights plaintiffs seek, the identity of interests between the two classes of inmates requires an identity of treatment.

CONCLUSION

FOR THE ABOVE-STATED REASONS,
THE DISTRICT COURT'S ORDER SHOULD
BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
October 18, 1976



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Re: Zurak v. Regan, Index No.
76-2100

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

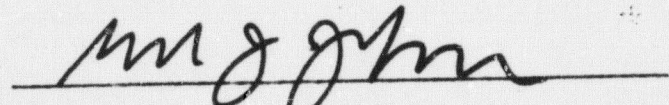
GORDON J. JOHNSON, an attorney duly admitted
to practice in the State of New York, hereby affirms the
following to be true under penalty of perjury:

That he is over the age of 18 years and that he is
not a party to the above-referenced proceeding and that his
business address is 15 Park Row, New York, New York 10038.

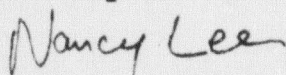
That on October 18, 1976 he served a copy of
brief for appellees.

in the above-referenced proceeding.

That these papers were served by personally delivering
a copy to Arlene Silverman, who he knew to be
of counsel to Louis J. Lefkowitz, Attorney for appellants
who accepted service on his behalf.


GORDON J. JOHNSON

Sworn to before me this
18th day of October, 1976.


NANCY LEE
Notary Public, State of New York
No. 4519262
Qualified in New York County
Commission Expires March 30 1978